Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1554

In The

Supreme Court of the United States

October Term, 1984

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ALLYN R. SIELAFF, Director Virginia Department of Corrections,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

—o—

On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

—o—

BRIEF OF AMICI CURIAE

—o—

THE STATE OF IDAHO, JOINED BY ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, GUAM, HAWAII, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, THE VIRGIN ISLANDS, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN and WYOMING IN SUPPORT OF PETITIONER.

—o—

JAMES THOMAS JONES
Attorney General of Idaho

*LYNN E. THOMAS
Solicitor General of Idaho

Statehouse, Room 210
Boise, Idaho 83720
(208) 334-2400

*Counsel for *Amici Curiae*

(Attorneys General of Counsel listed on following page)

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

CHARLES A. GRADDICK
Attorney General
State of Alabama

HAROLD M. BROWN
Attorney General
State of Alaska

ROBERT K. CORBIN
Attorney General
State of Arizona

JOHN STEVEN CLARK
Attorney General
State of Arkansas

DUANE WOODARD
Attorney General
State of Colorado

STATE OF CONNECTICUT
by: John J. Kelley,
Chief State's Attorney

CHARLES M. OBERLY
Attorney General
State of Delaware

MICHAEL J. BOWERS
Attorney General
State of Georgia

RICHARD OPPER
Attorney General
Guam

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

NEIL F. HARTIGAN
Attorney General
State of Illinois

LINLEY E. PEARSON
Attorney General
State of Indiana

ROBERT T. STEPHAN
Attorney General
State of Kansas

DAVID L. ARMSTRONG
Attorney General
State of Kentucky

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

STEPHEN H. SACHS
Attorney General
State of Maryland

FRANCIS X. BELLOTTI
Attorney General
State of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

EDWIN L. PITTMAN
Attorney General
State of Mississippi

WILLIAM L. WEBSTER
Attorney General
State of Missouri

MIKE GREELY
Attorney General
State of Montana

ROBERT M. SPIRE
Attorney General
State of Nebraska

BRIAN McKAY
Attorney General
State of Nevada

STEPHEN E. MERRILL
Attorney General
State of New Hampshire

IRWIN I. KIMMELMAN
Attorney General
State of New Jersey

PAUL BARDACKE
Attorney General
State of New Mexico

LACY H. THORNBURG
Attorney General
State of North Carolina

NICHOLAS SPAETH
Attorney General
State of North Dakota

(Continued on next page)

(Continued from previous page)

ANTHONY J. CELEBREZZE, JR.
Attorney General
State of Ohio

MICHAEL TURPEN
Attorney General
State of Oklahoma

LEROY S. ZIMMERMAN
Attorney General
State of Pennsylvania

HECTOR RIVERA CRUZ
Attorney General
Puerto Rico

ARLENE VIOLET
Attorney General
State of Rhode Island

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina

MARK V. MEIERHENRY
Attorney General
State of South Dakota

W.J. MICHAEL CODY
Attorney General
State of Tennessee

JIM MATTOX
Attorney General
State of Texas

DAVID L. WILKINSON
Attorney General
State of Utah

JEFFREY AMESTOY
Attorney General
State of Vermont

VICTOR G. SCHNEIDER
Acting Attorney General
The Virgin Islands

WILLIAM G. BROADDUS
Attorney General
State of Virginia

KENNETH O. EIKENBERRY
Attorney General
State of Washington

CHARLIE BROWN
Attorney General
State of West Virginia

BRONSON C. LaFOLLETTE
Attorney General
State of Wisconsin

ARCHIE G. McCLINTOCK
Attorney General
State of Wyoming

QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright v. Sykes* rather than as an independent ground for habeas corpus relief.

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BRIEF OF AMICI CURIAE

INTERESTS OF AMICI CURIAE

Amici curiae, by their Attorneys General, file this brief in support of petitioner pursuant to United States Supreme Court Rule 36.4.

The court below held that attorney error not amounting to ineffective assistance of counsel could constitute cause for a state procedural default, the occurrence of which could otherwise preclude federal habeas relief in

the absence of a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72 (1977).

The interests of the several states and territories in this case are readily apparent. All have rules of procedure, the default of which can bar a criminal defendant from litigating claims of error in state appellate courts and by collateral attack in federal courts.

The burden imposed on the criminal justice systems of the states by easily available federal collateral review is well known. Ready access to federal habeas courts to relitigate the validity of state criminal convictions drains limited state resources, contributes to lengthy delay in the final resolution of criminal cases, attenuates the accuracy of the final result, and diminishes public confidence in the ability of state courts to enforce the law. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142 (1970). Moreover, as Justice Jackson wrote, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen,* 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

These concerns have not escaped the notice of the Court and need not be extensively reviewed. *Engle v. Isaac,* 456 U.S. 107 (1982); *Mackey v. United States,* 401 U.S. 667 (1971) (Harlan, J., concurring).

The decision of the Court of Appeals is a matter of compelling importance not just to those jurisdictions in the Fourth United States Circuit, but to the others as well, both because the Court of Appeals has lowered the gates to federal habeas courts and because its decision is a developmental milestone in an area of law not yet well

settled. We believe the Fourth Circuit Court of Appeals has set off down the wrong path.

SUMMARY OF ARGUMENT

1. Federal collateral review of state criminal convictions intrudes, at great cost, on the finality of state judgments, often with little positive benefit. This Court undertook to limit the availability of federal habeas review of procedurally defaulted claims to those cases most likely to involve miscarriages of justice by its decision in *Wainwright v. Sykes,* 433 U.S. 72 (1977). The decision of the Court of Appeals that attorney errors or omissions may constitute "cause" to bypass the procedural default bar of *Sykes,* even though such errors or omissions may not be serious enough to constitute ineffective assistance of counsel, totally undermines the effectiveness of this Court's rule. The Court has distinguished between "ordinary errors" and those of constitutional significance. The Court of Appeals has ignored this distinction and adopted a rule that almost insures that state criminal judgments will rarely be final. That rule is contrary to the decisions of this Court.

Moreover, the rule adopted by the Court of Appeals creates a substantial risk of inaccurate resolution of factual issues in order to address an illusory problem, for federal habeas corpus proceedings rarely uncover genuine grounds for relief.

2. The reasons for the exhaustion requirement of 28 U.S.C. § 2254 are as much applicable to the determina-

tion of whether cause exists to excuse a state procedural default as they are to any other constitutional claim. The decision of the Court of Appeals is likely to encourage bypass of state courts and will certainly contribute to the perception that federal collateral review is almost always inevitable.

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ARGUMENT

I.

The Opinion of the Court of Appeals Without Good Reason Expands the Availability of Federal Review Beyond What Has Been Authorized by This Court

It would be hard to imagine a more effective general nullification of the finality of state court judgments than a rule that attorney omissions of less significance than ineffective assistance of counsel may be considered cause for a procedural default. The Court of Appeals decision to that effect turns a procedural default, intended by *Wainwright v. Sykes*, 433 U.S. 72 (1977), to be in most cases a bar to federal habeas courts, into a ground for relief. What is *not* cause for a procedural default if the occurrence of the default is cause? If the Court of Appeals meant to suggest that only a deliberate bypass of a state procedural rule would bar federal review, it seems clear that this approach was firmly rejected in *Sykes*.

The Court of Appeals summarized its holding by saying:

> Procedural default is excused not when counsel reasonably but incorrectly exercises her judgment, but

> when through ignorance or oversight, she fails to exercise it at all, in dereliction of the duty to represent her client. This is what we mean by attorney error, and in such a case, the defendant should not be penalized under *Wainwright* for a momentary lapse by counsel. *Carrier v. Hutto,* 724 F.2d 396, 401 (1983), *aff'd on rehearing, Carrier v. Hutto,* 754 F.2d 520 (4th Cir.) (en banc), *cert. granted sub nom. Sielaff v. Carrier,* 53 U.S.L.W. 3911 (1985).

The Court of Appeals' formulation has force only if it is assumed that it is the proper function of federal habeas courts to monitor every "momentary lapse by counsel" that might occur in state criminal proceedings. That assumption is clearly wrong.

It was important to the Court in *Sykes* that two competing interests be served. The Court hoped that the "cause and prejudice" rule announced would limit access to federal habeas courts to the most meritorious cases, with the several benefits that progress toward this goal would bring. At the same time, the Court perceived ". . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a *miscarriage of justice.*" *Id.* at 91 (emphasis added).

The narrowing intent of *Sykes* is consistent with the Court's long-time view of the function of federal habeas corpus to test "the very gravest allegations." *Townsend v. Sain,* 372 U.S. 293, 312 (1963); *Kaufman v. United States,* 394 U.S. 217 (1969).

The "cause and prejudice" rule of *Sykes* is effectively a device for withholding federal review in those cases

where defaulted claims of error do not bear on whether the result was a miscarriage of justice. In *Sykes* the Court took care to note that the rule would not prevent a litigant who had been the victim of a miscarriage of justice from presenting a federal constitutional claim for the first time in a federal habeas court. Later, in *Engle v. Isaac,* the Court held that although the nature of the defaulted claim of constitutional error as it affects the accuracy of the finding of guilt might well affect the determination of cause and prejudice, the bar of *Sykes* was not meant to apply only against such claims. *Isaac,* 456 U.S. 107.

The rule announced by the Court in *Sykes* that claims of error procedurally defaulted in state courts could not be considered in federal habeas corpus proceedings absent a showing of cause for the default and prejudice to the prisoner is consistent with the view that federal collateral review should not be available unless but for the alleged error there is a reasonable probability the outcome could be different. In this connection, "fairness" is a concept related to the reliability of the outcome of the trial. *See Strickland v. Washington,* — U.S. —, 80 L.Ed.2d 674 (1984).

Judge Friendly argued persuasively that federal collateral review of state criminal adjudications should generally not be available unless the prisoner could make some colorable showing of innocence. Friendly, *supra* at pp. 160, et seq. Although the Court has, of course, not gone this far, its recent decisions have pointed in that direction rather than toward a more expansive view of the availability of federal collateral review. The limitation on the

availability of federal habeas corpus to test Fourth Amendment exclusionary rule claims announced in *Stone v. Powell*, 428 U.S. 465 (1976), was premised in part on the circumstance that exclusion of evidence is not a personal right of an accused person. Failure by the defendant or his counsel to take advantage of a remedial procedure does not deprive the defendant of anything fundamental to his right to a fair trial, nor does it increase the risk of an inaccurate verdict of guilt. In such circumstances it is particularly appropriate to limit the availability of federal collateral review.

Similarly, the Court's observation in *Sykes* that the cause and prejudice bar would not apply to the claim of a defendant who would be the victim of a miscarriage of justice in the absence of federal habeas relief suggests a corresponding limitation on the availability of federal habeas relief to at least those cases presenting a constitutional claim casting genuine doubt on the reliability of the verdict or the fairness of the trial. *See also Engle v. Isaac*, 456 U.S. at 107.

The decision of the court below goes in the opposite direction. There was no showing that the claim Carrier wished to litigate was one casting doubt on the reliability of the verdict of guilt. Instead, Carrier asserted that he had been deprived of an opportunity to examine statements given to the police by the victim of his crime after the court had inspected them *in camera*. It was manifest that his lawyer's failure to appeal the trial court's order did not amount to a violation of the Sixth Amendment standard for effective assistance of counsel. 724 F.2d at 400.

It was not even suggested by the Court of Appeals that the claimed error cast any doubt on the accuracy of the finding that Carrier was guilty of the crime with which he was charged. Instead the lower court held that errors of counsel—if indeed counsel did err—falling short of ineffective assistance in a constitutional sense could constitute "cause" within the meaning of *Sykes*. This is a very broad opening to federal habeas litigation. It means simply that any time counsel fails to object at trial, for whatever reason, or fails to include any issue on appeal, or deliberately or inadvertently omits to raise some legal issue, for whatever reason, and is procedurally barred, a federal court must undertake to consider the effect of the error, and must do so in the absence of any state court ruling on the question.

Between 1961 and 1982 there was a 690% increase in the number of habeas corpus petitions filed in federal courts by state prisoners. Bureau of Justice Statistics, Special Report, U.S. Dep't of Justice, *Federal Review of State Prisoner Petitions—Habeas Corpus* at 1-2 (March, 1984). A Department of Justice study reflects that between 1977 and 1982 there was a 115% increase in appellate review of state prisoner habeas petitions, while overall appellate activity increased at the substantially lower rate of 51%. *Id.* In only 3.2% of the petitions filed was the prisoner given any kind of relief, and in only 1.8% of the petitions filed did the prisoner achieve any kind of release. *Id.* Successful habeas claims, in the great majority of cases, result not in the release of the prisoner but rather in a requirement for further judicial review. *Id.* It is apparent that most federal habeas litigation has little, if anything, to do with miscarriages of justice. Clearly

there is no need to expand the availability of relief as the Court of Appeals has done. As this Court has pointed out, "[o]nce the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted . . . ." *United States v. Frady*, 456 U.S. 152, 164 (1982).

The foreordained failure of undertaking to review all attorney errors causing procedural default can be appreciated by taking account of the formidable array and volume of ineffective assistance claims typically presented to courts. These have included complaints about the quality of examination and cross-examination of witnesses,[1] counsel's failure to interview witnesses who could have supplied no testimony useful to the accused,[2] counsel's omission to raise frivolous issues or advance baseless claims,[3] tactical use of a defendant's past criminal record,[4] failure to move for a change of venue where there was nothing to show the defendant did not receive a fair trial,[5] failure to object to instructions that correctly stated the law,[6] failure to call particular witnesses believed by the defendant to be more valuable to his cause than those selected by his counsel,[7] failure to demand a preliminary

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[1] *United States v. Benthiem*, 456 F.2d 165 (1st Cir. 1972); *State v. Gutierrez*, 618 P.2d 315 (Hawaii App. 1980).

[2] *Commonwealth v. Rainey*, 422 A.2d 652 (Pa.Super. 1980).

[3] *Commonwealth v. Silvis*, 452 A.2d 1045 (Pa.Super. 1982).

[4] *State v. Williams*, 468 P.2d 909 (Or.App. 1970).

[5] *Morton v. Henderson*, 389 F.2d 699 (6th Cir. 1967).

[6] *Francois v. State*, 423 So.2d 357 (Fla. 1982).

[7] *Johnson v. State*, 238 N.E.2d 651 (Ind. 1968); *State v. Sandy*, 452 N.E.2d 515 (Ohio 1982).

hearing,[8] failure to mount a constitutional attack against a plainly constitutional statute,[9] and failure of counsel to challenge the jurisdiction of a court that obviously had jurisdiction.[10] The apparently unlimited supply of imaginative bases for allegations of Sixth Amendment violation include contentions by pro se litigants who insisted on representing themselves at trial that they were denied effective assistance of counsel because trial judges allowed them to proceed.[11]

It is easy enough to say that each of these examples presents the potential for a miscarriage of justice, but if that is truly a feature of the case the matter is one of ineffective assistance of counsel, not something less. To allow less trivializes the Sixth Amendment protections. If the claims of a prisoner are not at least of the degree of significance of a separate Sixth Amendment claim, there is no good purpose to be served by a second course of review. Judge J. Edward Lumbard of the Court of Appeals for the Second Circuit has said:

> For all our work on thousands of state prisoner cases I have yet to hear of one where an innocent man had been convicted. The net result of our fruitless meddling in search of the non-existent needle in the ever-larger haystack has been a serious detriment to the administration of criminal justice by the states. The State of the Second Circuit, 25 Record, Assn. of Bar of City of New York 511, 516 (1970).

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[8] *Crowe v. State*, 194 N.W.2d 234 (S.D. 1972).

[9] *Maxfield v. State*, 700 P.2d 115 (Idaho App. 1985).

[10] *Brown v. State*, 452 S.W.2d 176 (Mo. 1970).

[11] *People v. Smith*, 338 N.E.2d 207 (Ill. App. 1975); *People v. McIntyre*, 324 N.E.2d 322 (NY 1974).

The ease with which an ineffective assistance claim can propel a prisoner into a course of collateral federal review makes clear the problem is large enough when review of attorney error is limited to such claims. The too common result of habeas review of ineffectiveness claims is illustrated by the Court of Appeals' illuminating observation in *Briley v. Bass*, 750 F.2d 1238, 1247 (4th Cir. 1984):

> The conduct of petitioner's trial co-counsel . . . has been extensively reviewed by both the Virginia state courts on collateral attack, with the benefit of an evidentiary hearing, and by the magistrate at the district court proceedings below, and *none of these reviewing authorities have found counsel to have been inadequate to their task. Nevertheless, we have undertaken our own review of the record in light of the numerous allegations of ineffective assistance presented by petitioner, and we find those allegations meritless.* (Emphasis added.)

Clearly enough, expanding the availability of federal habeas review to claims of attorney error falling short of Sixth Amendment violations would present a nearly insurmountable obstacle to the goal of affording maximum deference to state court judgments.

The impact of such a rule would be particularly devastating for those states with capital punishment laws. As is well known, strategies of delay, facilitated by filing successive petitions for federal habeas review, are commonly pursued in these cases. *See, e.g., Evans v. Bennett*, 440 U.S. 1301 (1979) (opinion in chambers), and it seems unlikely that the abuse of process provision of Rule 9(b), *Rules Governing Section 2254 Cases*, authorizing dismissal of successive petitions, would be held to bar a claim previously defaulted for cause, even if "cause" could be prac-

tically anything. The Court of Appeals' decision unwisely affords counsel bent on delaying capital cases, or others, an impressive opportunity.

The Court of Appeals' decision also ignores an important distinction drawn by the Court between errors of counsel having constitutional importance and those deemed not to justify relief from their consequences.

It was argued in *McMann v. Richardson,* 397 U.S. 759 (1970), that a plea of guilty was involuntary if it was the result of counsel's miscalculation about the admissibility of allegedly coerced confessions, as affected by a subsequent change of law. The Court rejected the argument, pointing out that a decision by a counseled defendant to plead guilty must be based on judgments of counsel that cannot be reliably certain about the future course of the law or how a court might view given facts. The Court's observation respecting the weight to be given counsel's judgments that do not fall short of the Sixth Amendment standard is particularly significant in the present context:

> It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; *further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.* 397 U.S. at 774. (Emphasis added.)

See also Parker v. North Carolina, 397 U.S. 790 (1970).

The assumed risk holding of *McMann v. Richardson* has been most commonly applied according to the relatively narrow principle that a counseled defendant pleading guilty, and thereby knowingly waiving and forfeiting a number of rights and procedural advantages, assumes the risk that the decision to do so may be affected by counsel's

ordinary errors in assessing the law and facts applicable to the case.[1]

Nevertheless it is consistent with this Court's limitations on the availability of federal habeas relief to consider procedural defaults of counsel falling short of ineffective assistance to be ordinary error, the consequences of which may fall upon the defendant without any affront to fairness or accuracy. In *Cooper v. Fitzharris,* 586 F. 2d 1325 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit viewed the "assumed risk" holding of *McMann v. Richardson* as following logically from the fact that "the Constitution does not guarantee representation that is infallible." 586 F.2d at 1325. Nor does the Constitution guarantee that every legal issue or investigative step that might come to mind will be pursued by counsel:

> If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. As already noted, a millionaire might have retained counsel to leave not a single stone unturned. However, a defendant is not entitled to perfection but to basic fairness. *United States v. DeCoster,* 624 F. 2d 196, 211 (D.C. Cir. 1976).

It would hardly encourage effective legal representation to base a right to pursue federal relief on "ordinary

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[1] *Harris v. State,* 367 So.2d 524 (Ala. Cr. App. 1978); *Mitchell v. State,* 609 S.W.2d 333 (Ark. 1980); *Bettis v. United States,* 325 A.2d 190 (D.C. 1974); *Dees v. State,* 492 S.W.2d 849 (Mo. App. 1973); *State v. Alvarez,* 177 N.W.2d 591 (Neb. 1970); *Mathis v. Warden,* 471 P.2d 233 (Nev. 1970); *Commonwealth v. McCloud,* 458 A.2d 219 (Pa. Super. 1983); *State v. Butler,* 564 P.2d 828 (Wash. App. 1977), *reh'g denied* (1977).

error" or on decisions of counsel that may have the appearance of such error. Counsel's ability to persuade a jury, a trial judge or an appellate court often depends greatly on separating important matters from those whose only office is to draw attention away from what is significant. "A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." *Jones v. Barnes,* 463 U.S. 745, 753 (1983). Furthermore, counsel has no duty to raise every nonfrivolous argument on appeal. *Id.* The Court of Appeals' holding is at odds with this principle. Counsel's omission to raise a constitutional issue below barred a course of federal review of nothing more than counsel's judgment or error on a matter having little potential for success on the merits.

The Court of Appeals' invitation to federal habeas courts to inquire into attorney errors of lesser magnitude than ineffective assistance of counsel elevates such errors to a level of constitutional importance. A finding that counsel omitted to pursue a remedy for nondisclosure could be cause, even though the underlying constitutional claim would not meet the standard of materiality necessary to justify federal relief. In short, the rule is one that would require federal habeas courts to entertain clearly unmeritorious claims.

In this Court's cases involving the evaluation of claimed constitutional error, the focus has consistently been upon the justice of the result. Accordingly, in *United States v. Agurs,* 427 U.S. 97 (1976), the Court held that the state's failure to disclose a murder victim's prior criminal record that would arguably have furnished evidence

of his violent character, supporting a defense theory of justification, was not constitutionally material. The standard of materiality was to reflect the Court's "overriding concern with the justice of the finding of guilt." 427 U.S. at 112. The Court pointed to the cumulative nature of the undisclosed evidence, its incongruity, and the circumstance that it did not contradict the state's evidence, holding that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*

A comparable view of the significance of reliability of the trial result in evaluating claims of constitutional error occurs in *Harrington v. California,* 395 U.S. 250 (1969), where a confrontation clause violation was harmless error because the strength of the case against the defendant was overwhelming, leaving no reasonable doubt of the reliability of the result, and in *Milton v. Wainwright,* 407 U.S. 371 (1972), where a *Massiah* violation was harmless error because the evidence independent of that erroneously admitted made out an overwhelming case of guilt.

The Court of Appeals characterized Carrier's underlying constitutional claim as an error by the trial judge in incorrectly applying the due process standards of *Brady v. Maryland,* 373 U.S. 83 (1963), and *Agurs* when he refused a request for discovery of the rape victim's statements to police because they contained nothing exculpatory. 724 F.2d at 399. The correct standard, in Carrier's view, was whether the specifically requested evidence "was 'material to guilt,' *Brady,* 373 U.S. at 87, not whether it was exculpatory." *Id.*

The importance of this distinction is significantly diminished by the Court's opinion in *Agurs,* where no con-

stitutionally meaningful difference between exculpatory evidence and evidence of the *Brady* variety was noted. In its discussion of *Brady* the Court equated *Brady* requests with requests for the disclosure of exculpatory evidence:

> In many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all Brady material" or for "anything exculpatory." . . . Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request. 427 U.S. at 106-107.

Thus, the Court of Appeals' holding is to the effect that the omission of counsel to pursue the disclosure issue on appeal is cause to place before a federal court nothing more than a dispute over whether there is a difference between exculpatory evidence and evidence "material to guilt," and this in the face of reason to believe there is not. Last term the Court held that undisclosed evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* No. 84-48, slip op. at 14 (July 2, 1985). Constitutional error in these circumstances is that which creates the possibility of a miscarriage of justice. Significance of this point escaped the Court of Appeals. It is just the kind of default exemplified by this case that this Court can well afford to treat as final in view of its concern with the connection between constitutional error and the reliability of a finding of guilt.

It is counsel's constitutional responsibility to perform according to the requirement that the proceeding be genuinely adversarial. When counsel's representation meets this expectation there can be confidence in the reliability of the result. *Strickland v. Washington, supra.* Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 80 L.Ed.2d at 692-693. This view of the constitutional basis of the right to effective assistance of counsel not only defines a right to a certain standard of conduct, it also limits the availability of federal relief to those cases falling outside that standard. The limitation is rendered meaningless by the Court of Appeals decision that, notwithstanding the Sixth Amendment limitations on the right to relief from the conduct of counsel, federal relief may be available on another theory for those omissions of counsel not considered sufficient to diminish confidence in the reliability of the trial result.

Although the right to the assistance of counsel is an element of basic fairness within the contemplation of the due process clause of the Fourteenth Amendment, *Powell v. Alabama,* 287 U.S. 45 (1932), the inquiry into what standards counsel must meet beyond the threshold due process right has been a matter of Sixth Amendment analysis. *Strickland, supra.* The Court of Appeals' decision effectively creates a due process right to effective assistance of counsel that is more expansive than that occurring under the Sixth Amendment. There is certainly no warrant in this Court's cases for this tortured result, and nothing to commend it as a matter of legal policy.

The cases establish that it was not the Court's intent either to define errors not likely to undermine confidence in the reliability of the trial outcome as constitutionally significant or to establish a right to federal review of lesser attorney errors. The decision of the Court of Appeals leaves no procedural bar and invites a proliferation of spurious claims. As the Court has said:

> The availability of intrusive postrial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. *Strickland,* 80 L.Ed.2d at 695.

Notwithstanding the circumstance that "ineffectiveness claims have become regrettably common," *Bettis v. United States,* 325 A.2d at 196 (D.C. 1974), they amount to stigmatizing assertions that counsel is not professionally reliable. Attorneys resent these claims, and those with the most to lose from being victimized by them, the most experienced and respected members of the bar, will be the quickest to distance themselves from criminal cases if it becomes any easier to subject counsel to a course of federal litigation on the subject of their representation of defendants. The Court of Appeals gave no consideration to this problem, but we think it another important argument against its holding.

A most significant reason for approaching the question of expanding the availability of federal habeas relief with greater caution than that exercised by the Court of Appeals is that facts related to the conduct of counsel

generally do not appear of record in the trial where the constitutional error assertedly occurred. The problem of reconstructing the facts is a serious one. "The motives of the defendant who may be pressed for a viable claim are more suspect as time goes on, and the ability of the parties and the court to later reconstruct anything like a reasonable facsimile of what actually happened dissipates." Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 Ariz. L. Rev. 443, 463 (1977).

More generally, it must be expected that collateral attacks on state criminal judgments are susceptible to the substantial risk that not all facts necessary to accurately resolve the dispute will be placed before the federal courts even if the information is available.

One writer has suggested that the decision in *Miller v. Pate,* 386 U.S. 1 (1967), was based on a factual error. M. Fleming, *The Price of Perfect Justice,* 31-35 (1974). In *Miller,* the Court overturned an Illinois murder-rape conviction in the belief that the prosecutors conducting the case had deliberately misrepresented to the jury that a paint-stained pair of shorts was bloodstained. Following the decision, the Grievance Committee of the Illinois State Bar Association conducted an extensive ethics investigation into the charge of deliberate misrepresentation. It reported that:

> At the trial, which took place in 1956, the State chemist testified that there *were* bloodstains on the shorts in question. Prior to the trial, the prosecutors had been given a laboratory report from the Illinois State Bureau of Criminal Identification which disclosed that the shorts did, in fact, contain blood. The State chemist further testified at the trial that the blood on the shorts was type "A" which was the same type as that of the victim. 56 Ill. Bar Jn'l 955, 956 (1968).

It is likely that federal habeas proceedings will be conducted by counsel who did not participate in the prisoner's state trial. The record of the case will often be the product of multiple state proceedings and may be very voluminous. The record may be only partial, by design of state appellate counsel or by omission, and it may not be readily apparent that this is so. Federal collateral review thus contains a built-in mechanism for attenuating the facts of the case. This risk to the accuracy of factual determinations, inherent in all collateral review, becomes more pronounced as the conduct to be reviewed becomes more trivial.

By contrast, the record placed before a federal habeas court on a claim that a prisoner was denied *any* meaningful representation, *Powell v. Alabama*, *supra*, is likely to be factually complete. It is easy to discern the most obvious failures of justice, and at all stages preceding the petition for federal habeas corpus they will have been the focus of everyone's attention. On the other hand, if the omission of counsel offered as "cause" to bypass a procedural default was the failure to make a contemporaneous objection or, as here, the failure to preserve an issue for appellate review, the question may be arising for the first time in federal court. If there are facts of record bearing on the claim, they may never have been transcribed because the issue was not a part of any state proceeding. Or, if the facts respecting counsel's conduct must be developed for the first time in federal proceedings, it may be necessary to do so many years after the relevant facts have faded in the memories of the principal participants. The Court of Appeals view that lesser errors may constitute "cause" under *Sykes* exacerbates a problem that is serious enough without any amplification.

Past experience, as well as empirical evidence mentioned earlier, makes it clear that the attainment of justice does not hinge on expanding the availability of federal habeas corpus relief. No good reason was advanced by the Court of Appeals that would support a conclusion that federal review of minor errors of counsel would contribute in the slightest degree to the fairness of reliability of determinations of guilt in criminal cases. This kind of review is essentially superfluous and its costs are great, as a former Assistant Attorney General of the United States has observed:

> Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining and reexamining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments. . . . This comparatively new concept of federal habeas corpus has dangerously prejudiced the delicate balance of federal-state relations and has seriously degraded the authority of the states and their judicial tribunals. Doub, *The Case Against Modern Habeas Corpus,* 57 Am. Bar Ass'n Journal, 323, 326 (1971).

II.*

The Inquiry Into Whether There Is Cause for a Procedural Default Should Be First Undertaken by State Courts.

The Court of Appeals bypassed the Virginia state courts in considering the "cause and prejudice" issue with the remark that "[t]he exhaustion requirement of 28 USC § 2254 pertains to independent claims for habeas relief,

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*The States of Alabama, Connecticut, Georgia and Illinois do not join in this section of the brief.

not to the proffer of *Wainwright* cause and prejudice." 724 F.2d at 402. Thus, as the court viewed it, a petition containing both a claim of attorney error constituting cause to overcome the *Sykes* bar and a separate claim of ineffective assistance of counsel would be subject to remand to state courts only if the ineffectiveness claim were unexhausted.

In *Rose v. Lundy,* 455 U.S. 509 (1982), the Court held that considerations of federalism dictated that state courts have the first opportunity to pass on claims of constitutional error. The Sixth Circuit Court of Appeals concluded in *Alcorn v. Smith,* 724 F.2d 37 (6th Cir. 1983), that these considerations compelled the conclusion that the cause issue was subject to the exhaustion requirement.

This question substantially overlaps the concerns addressed earlier. For the reasons expressed in Part I of this brief, the Court should conclude that considerations of federalism argue against exceptions to the exhaustion rule that would broaden the availability of federal collateral review.

The decision of the Court of Appeals deprives the exhaustion rule of much of its force. A purpose of the exhaustion requirement was to permit state courts the first opportunity to pass on matters affecting the protection of the accused's federal constitutional rights. *Rose v. Lundy, supra.* Applying the Court of Appeals' decision, this purpose is to be overlooked on a question of cause. No good reason was advanced in support of this

precept. To the contrary, the reasons for comity apply as much to the "cause" determination as to any other issue on which federal courts are to await the judgment of state courts. State rules of procedure often afford relief from procedural defaults, as is the case in Virginia. The Court of Appeals has furnished no compelling reason why a habeas petitioner should be permitted, at his option, to proceed directly to federal court without ever presenting his "cause" to the state judiciary. If Carrier had presented his cause claim to the Virginia courts and succeeded in having his underlying constitutional claim considered, either there would have been no occasion for federal intervention or federal review would at least have been accompanied by a state court's consideration of the constitutional issue based on a view of the facts from one step closer to the relevant occurrences.

The decision below builds into the law an advantage which could actually encourage counsel to default procedurally in order to bypass state courts likely to be more familiar with the factual and procedural background of the case. The benefit to a defendant without a meritorious claim is obvious. It is also obvious that conferring such a benefit is a detriment to the truth-seeking function of the law.

In addition, every time a federal court refuses to await the exhaustion of state remedies it contributes to the perception that it is inevitable there will be a second run in federal court through all of the issues that have been or should have been litigated in the state courts, where the primary responsibility for enforcing state criminal law rests. It is a reflection of this fact that frequent efforts have been made by states to waive the exhaustion

requirement on the theory that if a constitutional issue must always be litigated in federal courts one might as well begin there. *Cf. Houston v. Estelle,* 569 F.2d 372 (5th Cir. 1978) (state waiver of exhaustion accepted); *Naranjo v. Ricketts,* 696 F.2d 83 (10th Cir. 1982); *Sweet v. Cupp,* 640 F.2d 233 (9th Cir. 1981); *United States ex rel. Trantino v. Hatrack,* 563 F.2d 86 (3d Cir. 1977), *cert. denied,* 435 U.S. 928 (1978) (state waiver of exhaustion not authorized).

If the decision of the Court of Appeals is allowed to stand, it will obviously undermine this Court's emphasis on the principle of deference to state court judgments.

CONCLUSION

The Court of Appeals' expansion of the availability of the writ of habeas corpus in federal courts is not only unnecessary, it is an unwarranted expansion of this Court's cases and lays the groundwork for greater and costlier intrusions into the law enforcement functions of state courts. Public confidence in the ability of both the federal and state judicial systems to uphold the law is undermined by the perception that criminal judgments entered in state courts are rarely final. Yet, the extensive opportunities for federal collateral review result in relief in only the rarest cases, suggesting that much of such review is wasted effort. The conflict between state and federal institutions, intrinsic in the process of federal collateral review, is magnified by the failure of federal courts to give proper weight to the rule requiring exhaustion of state remedies before federal relief may be pursued.

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

JAMES THOMAS JONES
Attorney General of Idaho

*LYNN E. THOMAS
Solicitor General

Statehouse, Room 210
Boise, Idaho 83720
(208) 334-2400

*Counsel for *Amici Curiae*